86-410

Supreme Court, U.S.
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CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

RANDALL FRINT and YHONIS FRINT,

Petitioners,

-against-

TEXACO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a jury be expected to deliberate earnestly and impartially and return a fair verdict after it hears that a plaintiff will receive about a quarter million dollars ($250,000.00) in Social Security disability insurance benefits?

2. Can a plaintiff open the door to immaterial evidence of collateral benefits by proving up his damages?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled case on May 1, 1986, and the denial of the Petition for Rehearing on June 6, 1986.

REFERENCE TO OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the United States District Court for the Southern District of Florida without opinion. Copies of the appellate Court's decision and its order denying petition for rehearing are attached hereto. The only opinion below pertinent to questions presented was rendered by the United States District Court for the Southern District of Florida granting Plaintiff's motion in limine and a copy thereof is attached hereto.

JURISDICTION

On May 1, 1986 the United States Court of Appeals for the Eleventh Circuit entered judgment. On June 6, 1986 it

denied Petitioners' petition for rehearing. This Honorable Court has jurisdiction over this cause pursuant to Title 28, United States Code, Section 1254 (1).

STATUTE AND RULE INVOLVED

28, U.S.C., SECTION 2111.

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61, Federal Rules of Civil Procedure.

> "No error either in the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding

which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioners filed this personal injury lawsuit in the Circuit Court in Palm Beach County, Florida. Respondent removed the action to the United States District Court for the Southern District of Florida based on diversity of citizenship and amount in controversy in excess of ten thousand dollars pursuant to 28 U.S.C. Section 1332 (1) and 28 U.S.C. Section 1441.

Petitioners alleged and presented evidence that RANDALL FRINT slipped on water issuing from a ruptured water line within Respondent's maintenance responsibility, fell and suffered severe and permanent bodily injuries.

Before trial Petitioners requested and were granted an order in limine

intended to keep immaterial and prejudicial evidence of collateral benefits from the jury.

Each and every issue of fact as to liability was strenuously contested at the trial. The testimony was in irreconcilable conflict.

During their case in chief, Petitioners presented the testimony of an economist relative to the present value of RANDALL FRINT'S loss of future earning capacity including loss of Social Security retirement benefits.

At the end of Respondent's presentation Respondent's vocational rehabilitation expert witness blurted into evidence unresponsive testimony to the effect that if RANDALL FRINT is totally disabled he will receive four hundred to five hundred dollars per month in Social Security disability insurance

benefits. Subsequently over Petitioners' objections Respondent elicited evidence relative to RANDALL FRINT'S eligibility for additional Medicare benefits. Defense counsel repeatedly stressed the collateral benefits in his summation. Respondent was granted a jury instruction to deduct collateral benefits from the verdict notwithstanding Petitioners' objection.

The jury returned a no-liability verdict. Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the decision and denied a petition for rehearing.

REASONS FOR GRANTING THE WRIT

The decision below appears to conflict with this Honorable Court's precedents. Tipton v. Socony Mobil Oil

Company, Inc., 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4, reh. den. 375 U.S. 936, 84 S.Ct. 328, 11 L.Ed.2d 268 (1963), Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), Eichel v. New York Central Railroad Co., 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963). The appellate Court did not write an opinion. The conflict clearly appears when all potential alternative bases for decision are logically eliminated.

There is no doubt that the exclusionary corollary to Florida's applicable substantive common law collateral source rule prohibits mention of receipt by the plaintiff of Social Security disability insurance benefits. Winston Towers 100 Association v. DeCarlo, 481 So.2d 1261, (Fla. 3rd DCA 1986), Florida Physicians Insurance

Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1985), Stanley v. United States Fidelity & Guaranty Co., 425 So.2d 605 (Fla. 1st DCA 1982), Cook v. Eney, 277 So. 2d 848 (Fla. 3rd DCA 1973), cert. den. 285 So.2d 414 (Fla. 1973). Indeed, during oral argument before the Eleventh Circuit Court of Appeals, counsel for Respondent conceded that the Winston Towers case made this clear. Furthermore Florida courts have uniformly held that any suggestion that a plaintiff may receive significant collateral benefits constitutes harmful reversible error. Cook v. Eney, supra., Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975), Clark v. Tampa Electric Company, 416 So.2d 475 (Fla. 2nd DCA 1982), Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982), Stanley v. United States Fidelity and Guaranty Co., 425 So.2d 608 (Fla. 1st

DCA 1982), reversed on other grounds Florida Physician's Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984).

Probably the appellate Court did not decide that Petitioners opened the door to the evidence for reasons set forth hereinafter. (If the Court did so decide, then the petition should be granted for the reasons set forth hereinafter).

State substantive common law collateral source rules could be significantly undermined if in diversity cases the harmless error rule was applied so as to override the exclusionary rule.

The error affected Petitioners' substantial rights. The natural effect of erroneous admission of evidence of significant collateral benefits is to endanger any possibility of fair deliberation and impartial verdict.

There can be no confidence that our jury was not swayed by the evidence.

> "...the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting....if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, 66 S.Ct. at 1247-1248.

There was a lively dispute as to Respondent's liability for Petitioner's losses. Evidence presented by Petitioners and Respondent was in irreconcilable conflict on all critical

issues except damages. The parties heavily attacked the credibility of each others' liability witnesses. In these circumstances it was most critical to protect the jury from improper influence.

In these circumstances Respondent corrupted the trial with blurted immaterial, prejudicial testimony that RANDALL FRINT is eligible to receive Social Security disability insurance payments in the amount of four hundred to five hundred dollars per month for the rest of his life, thirty-five to forty years, about a quarter million dollars.

Defense counsel made the most of the collateral benefits in his summation. He told the jury that Petitioners would receive more from Social Security than RANDALL FRINT would have earned had he not been injured at all. He also decried "double payments."

It is very possible that our jury was motivated to find for Respondent as to liability by a belief that Social Security would meet Petitioners' needs or by a desire not to over compensate Petitioners at Respondent's expense. Tipton v. Mobil Socony Oil Company, supra., Eichel v. New York Central Railroad Co., supra, Savoie v. Otto Candies, Inc., 692 F.2d 363 (5th CCA 1982), Southern v. Plumb Tools, a Division of O'Ames Corporation, 696 F.2d 1321 (11th CCA 1983). It is impossible to place any confidence in such a difficult decision so corruptly influenced.

As stated previously, Petitioners presented the testimony of an economist relative to the present value of RANDALL FRINT'S loss of future earning capacity, including lost Social Security retirement

benefits. Respondent argued to the Circuit Court that in so doing Petitioners opened the door to testimony about RANDALL FRINT'S eligibility for collateral Social Security disability insurance benefits. This argument was wholly unmeritorious and probably the Circuit Court rejected it. However during the oral argument two Judges on the panel seemed to accept it. If this was the basis for the decision, the writ of certiorari should be granted.

The second question is of great importance. Indiscriminate application of the doctrine of curative admissibility could nullify the collateral source rule.

Petitioners properly used the economist's testimony to prove up their damages. The testimony was admissible. Raines v. New York Central Railroad Company, 51 Ill.2d 428, 238 N.E.2d 230

(1972), Krakar v. Don Swart Trucking, Inc., 323 F. Supp. 157 (W.D. Pa. 1971), Groat v. Walkup Drayage and Warehouse Co., 14 Cal.App.2d 350, 58 P.2d 200 (1936), Cunningham v. Rederiet Vindeggen A/S and M/S Trolleggen, 333 F.2d 308 (2nd CCA 1964), Boston and Maine Railroad v. Talbert, 360 F.2d 286 (1st CCA 1966), University of Delaware v. Munson, 316 A.2d 206 (Del. 1974), Annot., 81 ALR2d 949 (1962). The record will reflect that Respondent did not object to the testimony.

The doctrine of curative admissibility is properly invoked only to counteract the prejudicial effect of inadmissible evidence previously introduced. 1 Wigmore on Evidence, Section 15 (1983).

Furthermore, introduction of evidence quantifying plaintiff's losses

cannot logically justify admission of evidence as to his eligibility for collateral benefits. Evidence relative to collateral benefits is inadmissible not only because it is very prejudicial, but also because it is completely immaterial. Florida substantive common law permits a plaintiff to recover all his damages, including lost earning capacity, of which lost retirement benefits is a part, even if he is partially compensated by a collateral source. Evidence of collateral benefits simply is not pertinent regardless of a plaintiff's claims as to damages.

> "There is a general requirement that evidence submitted under the aegis of curative admissibility relate to the matter shown by the inadmissible evidence submitted by the other party. ...the aim of curative admissibility is to give the party harmed by the introduction of inadmissible evidence an opportunity to counter the inferences that may be drawn from that inadmissible evidence; he

should not be given a license to create prejudice of a different sort, unrelated to the prejudice caused him, merely so that he has a better chance of winning...

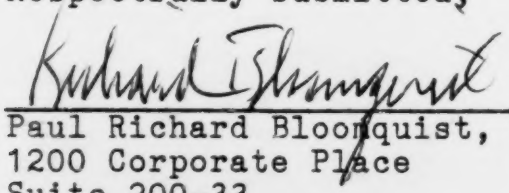
"The danger that the doctrine of curative admissibility is designed to meet is the danger that the jury will draw and use inferences with respect to immaterial matters, not that the jury will rely on unreliable evidence with respect to a material matter. If the latter concern were the true basis for the principle of curative admissibility, there would be no satisfactory reason to permit a counterattack with respect to that material matter by the use of normally inadmissible evidence since, by hypothesis, the rebutting evidence...also lacks significant probative value and thus cannot...be expected to diminish the prejudice inflicted by the other party's incompetent evidence..." 1 Wigmore on Evidence, Section 15 (1983).

If the Circuit Court decided Petitioners opened the door to the evidence it erroneously turned the doctrine of curative admissibility from a shield against prejudice against Respondent into a sword of prejudice against Petitioners.

It is hard to believe that the Eleventh Circuit Court of Appeals would make such a decision. Probably the Court decided that admission of the evidence, although erroneous, was harmless.

The decision below departed so far from the accepted and usual course of judicial procedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Honorable Court's power of supervision.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-5398

RANDALL FRINT and
YHONIS FRINT,

Plaintiffs-Appellants,

versus

TEXACO, INC., a
foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING
(June 6, 1986)

BEFORE: FAY, Circuit Judge, HENDERSON* and NICHOLS**, Senior Circuit Judges.
PER CURIAM:

The petitions for rehearing filed by Randall Frint and Yhonis Frint is denied.

ENTERED FOR THE COURT:

PETER FAY
United States Circuit Judge

APPENDIX A

*See Rule 3(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable Philip Nichols, Jr., Senior U. S. Circuit Judge for the Federal Circuit, sitting by designation.

DO NOT PUBLISH

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NO. 85-5398

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versus

TEXACO, INC., a
foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(May 1, 1986)

Before FAY, Circuit Judge, HENDERSON* and NICHOLS**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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*See Rule 3(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable Philip Nichols, Jr., Senior U. S. Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-8282 Civ-GONZALEZ

RANDALL FRINT and
YHONIS FRINT,

Plaintiffs,

vs.

TEXACO, INC.,

Defendants

ORDER

THIS CAUSE has come before the Court upon the Motion in Limine filed on behalf of the plaintiffs.

The plaintiffs seek an order prohibiting the defendant from presenting evidence during trial regarding the receipt of compensation by the plaintiffs from collateral sources. Such collateral sources would include, but not be limited to workers' compensation, welfare and

APPENDIX C

insurance.

The defendant maintains that such an order would contravene recent Florida restrictions on the collateral-source rule. Specifically, the defendant asserts that the Florida legislature has eliminated the collateral-source rule in personal injury litigation arising from vehicular accidents. F. S. Section 627.7372 (West 1984). Additionally, in medical malpractice claims, after a finding of liability has been determined, the court is required to reduce the award by the amount paid to the client from all collateral sources not subject to subrogation. F. S. Section 768.50(1) (West Supp. 1984). Finally, the defendant contends that Florida Physician's Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984), struck down the collateral-source rule in remaining tort

actions. Thus, the defendant should be permitted to introduce or elicit evidence of payments from collateral sources.

This Court disagrees with this position relative to workers' compensation benefits and any other benefits which the plaintiffs are obligated to repay.

Under Florida's Workers' Compensation Law, should the defendant be found liable for the plaintiff's injuries, he is then obligated to repay the workers' compensation carrier for benefits received and for future benefits. F. S. Section 440.39(3)(a) (West Supp. 1984). Thus, evidence regarding such benefits shall not be admissible.

Further, the Court notes that while Florida law permits collateral-source evidence in personal injury litigation arising from automobile accidents, that law specifically states that

"[n]otwithstanding any other provision of this section, benefits received under the Workers' Compensation Law shall not be considered a collateral source." F. S. 627.7372(3) (West 1984). Thus, under the statute, evidence of workers' compensation benefits is not admissible.

Finally, the defendant's reliance on the Florida Physician's Insurance Reciprocal decision for its position that the collateral-source rule is no longer viable is misplaced. The court held that in medical malpractice litigation, evidence of free or low cost services available to the public is admissible on the issue of future damages and did not violate the collateral-source rule. The court then limited the collateral-source rule to benefits "earned in some way by the plaintiff." Id at 515. Thus, the collateral-source rule is viable for

benefits earned by the claimant. Worker compensation benefits and benefits for which the claimant is obligated to repay are such "earned benefits" and are inadmissible on the issue of damages.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion in Limine be, and the same, is GRANTED. The defendant shall not introduce or elicit evidence of collateral source benefits received from a workers' compensation carrier or from any other source where the plaintiffs are obligated to repay benefits received or to repay future benefits.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Florida, this 29th day of January, 1985.

UNITED STATES DISTRICT JUDGE
JOSE A. GONZALEZ, JR.

cc: all counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Certiorari was mailed to Carolyn Pickard, Esq., Mershon, Sawyer, Johnston, Dunwody and Cole, Southeast Financial Plaza, 200 S. Biscayne Blvd., Miami, FL 33131 this 29th day of August, 1986.

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